

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

NO. 77-6156

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BROOKHAVEN CABLE TV, INC., ET AL.,

Plaintiffs-Appellees,

UNITED STATES OF AMERICA and FEDERAL
COMMUNICATIONS COMMISSION,

Intervenors-Plaintiffs-
Appellees,

v.

ROBERT F. KELLY, Chairman of the New York
STATE COMMISSION ON CABLE TELEVISION, ET AL.,

Defendants-Appellants,

NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS,

Intervenor-Defendant-
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE INTERVENORS-APPELLEES UNITED STATES
OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

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BRIEF FOR THE INTERVENORS-APPELLEES UNITED STATES
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QUESTION PRESENTED

Whether the district court correctly held that the
Federal Communications Commission ("FCC") has jurisdiction
over pay cable television rates and has exercised that
jurisdiction so as to preempt regulation by the State of
New York.

COUNTERSTATEMENT OF THE CASE

In this civil action five companies, two associations, and a supplier in the pay cable television industry challenged actions by the New York State Commission on Cable Television attempting to regulate pay cable rates, asserting that pay cable rate regulation has been preempted by the Federal Communications Commission through the exercise of its rulemaking and regulatory authority under the Communications Act of 1934, 47 U.S.C. 151 et seq. The United States and the Federal Communications Commission intervened as plaintiffs. This is an appeal by the defendants Commissioners of the New York State Commission on Cable Television and the intervenor-defendant National Association of Regulatory Utility Commissioners ("NARUC"). The appeal is from an order entered by the United States District Court for the Northern District of New York (per Hon. Edmund Port, J.) declaring that the Federal Communications Commission has the authority to preempt the regulation of pay cable rates so as to prohibit state and local government regulation, that the Commission has exercised this authority, and that attempts by the State of New York to regulate such rates consequently are null and void (J.A. 5-7).^{1/} The district court's order also enjoins the defendants from regulating or attempting to regulate pay cable rates.

^{1/} "J.A." references are to the joint appendix.

COUNTERSTATEMENT OF THE FACTS

A. Background Of The Litigation

1. Cable Television

Cable television is a nonbroadcast communications facility that uses wire or cable to distribute broadcast and nonbroadcast programming to subscribers, who typically pay a flat monthly fee for the service.^{2/} Cable television is a broadband communications service: that is, it has the unique capability of providing many channels for the transmission of electronic signals without use of limited broadcast spectrum. Therefore, the cable television system, unlike the conventional television broadcast station, is not limited to transmitting programming on only one channel but rather has multiple channels available for the presentation of broadcast and nonbroadcast programming.

The broadcast programming provided by cable television systems consists of local television broadcast signals as well as the signals of distant television stations which cannot be received off-the-air in the cable community. The FCC regulates cable carriage of local and distant television broadcast signals (47 C.F.R. Part 76 (1976)).

At its inception thirty years ago, cable television served only as an auxiliary service that carried broadcast television signals to communities where off-the-air television reception was poor. These early systems were located

^{2/} A cable television system (or CATV system) is defined at 47 C.F.R. 76.5(a) (1976). Cablecasting is defined at 76.5(v).

in outlying areas and typically had three-channel capacity. By the mid-1960's, however, cable technology had advanced to the point that twelve-channel and higher capacity systems were emerging. With the expansion of channel capacity, cable systems began carrying the signals of distant television broadcast stations, cablecasting a variety of nonbroadcast programming, and spreading from rural to more populous areas. In 1966 the FCC became concerned over the adverse impact that cable television's carriage of distant television broadcast signals might have on local television broadcast signals. To curtail the potential adverse impact, the FCC promulgated rules limiting the distant signals that cable television systems could lawfully carry.^{3/} Its jurisdiction to do so was sustained by the Supreme Court in United States v. Southwestern Cable Co., 392 U.S. 157 (1968). Meanwhile in 1965 the FCC had commenced an investigation to determine whether the public interest would best be served by the Commission's restricting cable television systems to the carriage of television broadcast signals, by allowing them to originate programming without restriction, or by adopting an intermediate position.^{4/} In the ensuing three years cable technology continued to advance and the number of stations increased, particularly in metropolitan areas,

^{3/} Second Report and Order in Docket No. 14895, 2 FCC 2d 725 (1966).

^{4/} Notice of Inquiry and Notice of Proposed Rulemaking in Docket No. 15791, 1 FCC 2d 453 (1965).

where cable systems could reach 85 million people (J.A. 103-105). In 1969, after rulemaking proceedings,^{5/} the FCC decided that a multi-purpose cable operation combining carriage of broadcast signals with program origination^{6/} and access programming would best utilize cable channel capacity for the public benefit. The Commission also determined that cable television's unique multi-channel capacity made it singularly suited to further the achievement of long established goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of service. With this objective in view, the Commission adopted rules requiring that cable systems of a stated size originate their own programming.^{7/} The FCC's jurisdiction and authority to adopt and enforce these mandatory origination rules was sustained in United States v. Midwest Video, 406 U.S. 649 (1970), rehearing denied, 409 U.S. 898 (1972).

5/ Notice of Proposed Rulemaking and Notice of Inquiry in Docket 18397, 15 FCC 2d 417 (1968).

6/ Origination programming is cablecast programming that is either produced by the cable system operator or editorially controlled by him. Access programming is cablecast programming over which the system operator exercises no editorial control. See 47 C.F.R. 76.5(w) and (x).

7/ See First Report and Order in Docket No. 18397, 20 FCC 2d 201 (1969). In this report the FCC stated "state and local regulations or conditions inconsistent with these Federal regulatory policies are, we believe, preempted" (Id. at 223). See also In Re Clarification of CATV First Report as to Scope of Federal Preemption, 20 FCC 2d 741, 742 (1969); In Re Request by Time-Life Broadcast, Inc., 31 FCC 2d 747 (1971).

2. Pay Cable

Subscription cablecasting or "pay cable" involves the cable television system distribution of non-broadcast programming for which the cable television system subscriber is charged an additional fee on a per-channel or per-program basis beyond the regular monthly fee charged for the system's basic service which consists primarily of television signal reception service plus origination service.^{8/}

Pay cable is an interstate communications service, since cable television systems frequently transmit their own programming and retransmit broadcast television signals across state lines. Moreover, pay cable programming is not typically originated in the community in which the pay cable system operates, but is filmed or taped in, or televised from, locations in all parts of the country and abroad. For example, live sports programming is typically relayed to the cable community over interstate communications routes licensed and regulated by the FCC. Pay cable programming, including sports, feature films and other entertainment events, is most frequently relayed to the cable television community from a central distribution point over private or common carrier microwave radio

^{8/} See Hobson Affidavit, J.A. 100.

Although most pay cable subscription is currently on a per-channel basis, the technology for per-program subscription exists and has been implemented. Billing is accomplished through an electronic data processing system which makes it possible to charge a separate price for each special program, such as a first-run movie or major sports event, viewed.

stations, over the facilities of interstate common carriers via domestic communications satellites and associated earth stations, or by some combination of these facilities. Each of the interstate transmission facilities is regulated by the Commission.^{9/}

The over-the-air counterpart of pay cable is subscription television (STV). STV programs are broadcast in scrambled form and the STV subscriber pays a monthly fee to rent a device to unscramble the pictures. STV programming can also be distributed on cable systems, in which case the subscriber pays either the cable system or the STV station depending on the specific contractual arrangement involved.^{10/} A few words are in order about STV because the FCC's regulation of pay cable reflects its prior regulation of STV. In 1968, after seventeen years of studying subscription television, the FCC authorized and established rules governing STV operations.^{11/} The authority of the Commission to regulate STV was upheld by the District of Columbia Circuit in National Association

^{9/} See Hobson Affidavit, J.A. 103 and Chart at J.A. 116 showing typical distribution schemes for subscription programming.

^{10/} See Third Further Notice of Proposed Rulemaking in Docket No. 11279, 15 FCC 2d 201 (1968).

^{11/} In its Fourth Report and Order in Docket No. 11279, 15 FCC 2d 466 (1968), the FCC concluded that subscription television would provide a beneficial supplement to conventional free broadcasting, but placed restrictions on it to prevent "siphoning" from the free television upon which millions of viewers relied. See National Association of Theatre Owners v. F.C.C., 420 F. 2d 194, 197-198 (C.A.D.C., 1969), certiorari denied, 397 U.S. 922 (1970).

of Theatre Owners v. F.C.C., supra, 420 F. 2d 194 (1969).

The FCC did not undertake to regulate STV rates stating:

The public is free to subscribe or not to subscribe to STV services. We believe that the marketplace will regulate the charges and that if they are excessive the operations will succeed. 12/

The FCC has not undertaken to regulate all aspects of cable television but has sanctioned and even encouraged responsible state and local regulation of the cable industry with respect to the services rendered subscribers in a given locale. In 1972 the FCC decided that it would leave the franchising of cable systems to local authority, in lieu of requiring federal licensing, recognizing that local governments are inescapably involved in the process because cable makes use of streets and ways, that local authorities are able to bring a special expertise to such matters, for example, as to how best to parcel urban areas into cable districts; and that local authorities are also in a better position to follow up on service complaints. 13/

However, the FCC determined that under what it characterized as a "deliberately structured dualism" it must set at least minimum standards for franchises issued by local authorities because of the limited resources of states and municipalities and its own obligation to ensure an efficient communications service with adequate facilities

12/ Fourth Report, supra, 15 FCC 2d at 548.

13/ 1972 Cable Television Report and Order in Docket No. 18397, 36 FCC 2d 143, 207.

at reasonable charges.^{14/} These minimum standards are administered by a certifying process--i.e. before a cable system commences operation it must obtain a certificate of compliance from the FCC.^{15/} The FCC regulations established in 1972 under the policy of dual jurisdiction over the cable industry permitted local authorities "to regulate rates for services regularly furnished to all subscribers".^{16/} The FCC did not give state and local governments authority to regulate rates for per-program or per-channel charges.

The distinction between the FCC's grant of authority to state and local governments to regulate rates for regular subscriber services, and withholding of authority for local regulation of pay cable charges was clarified in 1974 when the Commission stated:

In Section 76.31(a)(4) [of 47 C.F.R.] we require that cable systems, in order to receive a certificate of compliance, must have a franchise providing for franchisor approval of initial charges for installation and regular subscriber service. We have intentionally and specifically limited rate regulation responsibilities to the area of regular subscriber service, and we will continue to do so. We have defined "regular subscriber service" as that service regularly provided to all subscribers. This would include all broadcast signal carriage and all our required access

^{14/} Ibid.

^{15/} See generally 47 C.F.R. 76.31.

^{16/} 36 FCC 2d at 209.

channels including origination programming. It does not include specialized programming for which a per-program or per-channel charge is made. The purpose of this rule was to clearly focus the regulatory responsibility for regular subscriber rates. It was not meant to promote rate regulation of any kind.

After considerable study of the emerging cable industry and its prospects for introducing new and innovative communications services, we have concluded that, at this time, there should be no regulation of rates for such services at all by any governmental level. Attempting to impose rate regulation on specialized services that have not yet developed would not only be premature but would in all likelihood have a chilling effect on the anticipated development.

17/

Subsequently in 1975 the FCC reiterated that "the Commission has preempted the field of pay television cablecasting so that local franchise terms [purporting to regulate subscription cablecasting] are inoperative ".^{18/}

The Commission stated:

Although we have not ourselves undertaken the regulation of rates for the sale of subscription programming, we regard our prior statements concerning the regulation of subscription operations as preempting local regulation of rates as well as program content. We do not believe that regulation of subscription rates is either practicable or necessary at this time. The competitive alternatives to subscription television are plentiful,

17/ Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry in Docket Nos. 20018 et al., 46 FCC 2d 175, 199-200 (1974).

18/ First Report and Order in Docket No. 19554, 52 FCC 2d 1, 67 (1975).

including most particularly free television, motion picture theatres, live sports, and other entertainment events. As we said with respect to over-the-air subscription rates:

The public is free to subscribe or not to subscribe to STV services. We believe that the marketplace will regulate the charges that are paid and that if they are excessive, the operations will not succeed. . . .

In any case, we believe that the complex nature of subscription cable-casting and broadcasting, with implications not coincident with state boundaries, dictates that its regulation emanate from a single source, and that determinations as to when and how to regulate the service must be made at the federal level. ^{19/}

In the following year the FCC again emphasized that the Commission had not only declined to regulate rates for "subscription television programs, leased channels, advertising and other auxiliary services", but had preempted their regulation by state and local authorities. ^{20/}

3. The New York Law

Article 28 of New York's Executive Law (McKinney's 1976) ^{21/} provides for the regulation of cable television systems by a Commission on Cable Television. Section 811 recites the legislature's findings with respect to the

^{19/} 52 FCC at 68.

^{20/} Notice of Inquiry in Docket No. 20767, 58 FCC 2d (1976).

^{21/} Article 28 is reproduced as an Addendum to the Brief of the National Association of Regulatory Utility Commissioners.

need for such an agency to develop a state telecommunications policy "to promote the rapid development of the cable industry responsive to community and public interest and consonant with policies, regulations and statutes of the federal government". Section 815 defines the State Commission's duties to develop and maintain a statewide plan for the development of cable television services "to the extent permitted by, and not contrary to applicable federal law, rules and regulations". Section 822 requires that all cable television franchises and amendments to such franchises be approved by the State Commission after April 1, 1973. Section 825 requires that the rates charged by a cable television company be those specified in its franchise, and prohibits any change in those rates except by amendment to the franchise.

The franchises of most cable television systems in New York presently specify only rates for regular subscriber services. They do not specify pay cable rates (i.e. charges for special programs) because the FCC's repeated rulings that it has preempted the field.^{22/} To clarify the confusion generated by Sections 822 and 825 as to what rates must be specified in a franchise, on March 1, 1976 the State Commissioners issued a Clarification of Commission Policy.^{23/} The Commissioners asserted that (1) all subscriber rates were required to be authorized

^{22/} Plaintiffs' Complaint, J.A. 15.

^{23/} The Clarification is reproduced at J.A. 68.

in the local franchise held by a cable television system; (2) no change in subscriber rates could be adopted without amendment to the franchise; (3) all franchise amendments were subject to the approval of the Commission; (4) no exclusion or exemption from the above requirements was provided for rates for any "pay", "auxiliary" or "subscription" cable service; (5) companies already providing pay cable services would not be required to amend their respective franchises but would be required to give notice within two months to their respective municipalities and to the Commission of the rates currently charged for their pay cable services or face "appropriate sanctions"; and (6) "active enforcement" of these policies would be undertaken.

B. The Proceedings Below

The plaintiffs below, who are five cable television operators, two trade associations, and a supplier of services to cable television companies, challenged the State Commission's power to regulate pay cable rates. They sought a declaration that the Commission's actions in view of the FCC's preemption of the field were in violation of the Supremacy and Commerce Clauses of the United States Constitution, and of the First, Fifth and Fourteenth Amendments, and an injunction prohibiting the Commissioners from regulating pay cable rates (J.A. 15-23). Subsequently the plaintiffs moved for summary judgment on the Supremacy Clause cause of action (J.A. 32), and in support thereof offered affidavits which indicated that the cable systems would be adversely affected by State regulation of pay

cable rates.^{24/} The Commissioners filed a cross motion for summary judgment (J.A. 63). Thereafter the United States and the FCC intervened as plaintiffs, and the National Association of Regulatory Utility Commissioners ("NARUC")^{25/} intervened as a defendant.

The district court (per Hon. Edmund Port, J.) held that the FCC had preempted pay cable rate regulation and that its preemption was within its authority under the Federal Communications Act.^{26/} Applying the touchstone enunciated by the Supreme Court in United States v. Southwestern Cable Co., 392 U.S. 157, 178 and United States v. Midwest Video Company, 406 U.S. 649, 663, the court determined that the FCC's assertion of jurisdiction over pay cable rates was "reasonably ancillary" to the performance of the Commission's responsibilities for the regulation of television broadcasting (J.A. 158-164). The court stated:

The FCC has determined that rates for pay cable TV should be set by market-place forces and not regulated by state or local authorities. The rationale behind this decision is simply that rate regulation can be expected to chill development of the

^{24/} See e.g. Reply Affidavit of Stuart Feldstein, Vice President and General Counsel of plaintiff National Cable Television Association, J.A. 87; Affidavit of Bruce P. Sawyer, Executive Vice President of Home Box Office, J.A. 75.

^{25/} Additionally, the City of New York filed a brief amicus on behalf of the defendants.

^{26/} The district court's opinion is reproduced at J.A. 150.

new medium, whereas a free market environment should enable it to grow. Since the FCC has also determined that pay cable TV will increase programming diversity, it follows that efforts to nurture and protect this infant medium will, likewise, result in an increase in programming variety. This same rationale supported an earlier decision of the FCC to preclude rate regulation of another infant medium, subscription television (STV). National Association of Theatre Owners v. F.C.C., 420 F. 2d 194 (D.C.Cir., 1969), cert. denied, 397 U.S. 922 (1970). [J.A. 162.]^{27/}

Accordingly, the court entered an order^{28/} declaring that the FCC has the authority and jurisdiction to preempt the regulation of pay cable rates and to prohibit state and local governments from regulating such rates, and that it has exercised this preemptive authority so as to render the State Commission's actions invalid (J.A. 5-6). The court also enjoined the State of New York from regulating or attempting to regulate pay cable rates in any manner (J.A. 7).

^{27/} The court also relied on American Civil Liberties Union v. F.C.C., 523 F. 2d 1344 (C.A. 9, 1975), which sustained the FCC's jurisdiction to regulate leased access channels.

^{28/} The court's "Final Judgment" is reproduced at J.A. 5.

ARGUMENT

Introduction and Summary

In Point I below we show that the FCC has authority under the Communications Act of 1934 to preempt state regulation of pay cable rates by virtue of the Supreme Court's decisions in National Broadcasting Company v. United States, 319 U.S. 190 (1943); United States v. Southwestern Cable Company, supra, 392 U.S. 157 (1968); and United States v. Midwest Video, supra, 406 U.S. 649 (1972). In particular, we rely upon Midwest Video, wherein the Court held that not only does the FCC have jurisdiction over CATV, as previously held in Southwestern Cable, but that "the Commission's legitimate concern in the regulation of CATV is not limited to controlling the competitive impact CATV may have on broadcast services . . . but extends also to requiring CATV affirmatively to further statutory policies" (406 U.S. at 664). Moreover, the Court recognized in Midwest Video that "increasing the number of outlets for community self expression and augmenting the public's choice of programs and types of services" (Id. at 667-668) is a legitimate statutory objective. In the present case the district court correctly determined that the FCC had authority to preempt state and local regulation of pay cable because the preemption furthered this same statutory objective.

In Point II we show that the FCC effectively exercised its preemptive authority by the series of policy statements it issued following public rule-making procedures. Here

we rely in particular upon Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 774 (1947) wherein the Court held that federal preemption may be effected "where failure of federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute". The FCC has preempted state or local regulation of pay cable by declaring that there shall be no regulation whatsoever, either at the federal or state/local level. New York State's regulation of such rates cannot be enforced "without impairing federal superintendence of the field" (Head v. Board of Examiners, 374 U.S. 424, 444, concurring opinion of Mr. Justice Brennan) and therefore cannot be permitted to stand under the Supremacy Clause of the United States Constitution.

In Point III we show that there is no merit to the various contentions of the appellants, the New York State Commission and the National Association of Regulatory Utility Commissioners, including the latter's contention that there is no demonstrated "need" for the FCC's preemption of state and local regulation of pay cable television.

I.

THE FCC HAS AUTHORITY UNDER THE
COMMUNICATIONS ACT OF 1934 TO PREEMPT
STATE REGULATION OF PAY CABLE RATES.

The Communications Act of 1934, 47 U.S.C. 151,
provided for the creation of the Federal Communications
Commission:

For the purposes of regulating inter-
state and foreign commerce in communi-
cation by wire and radio so as to make
available, so far as possible, to all
the people of the United States a rapid,
efficient, Nationwide, and world-wide
wire and radio communication service
with adequate facilities at reasonable
charges. . . .

Accordingly, 47 U.S.C. 152(a) gives the FCC broad jurisdic-
tion over "all interstate . . . communications by wire or
radio".

Title III of the Act, 47 U.S.C. 301 et seq., provides
express authority for the FCC to control radio transmis-
sions, including the power to license, classify, and
prescribe the types of broadcast service that will be
provided. Additionally, the FCC is directed to

Study new uses for radio, provide for
experimental uses of frequencies, and
generally encourage the larger and
more effective use of radio in the
public interest. [47 U.S.C. 303(g).]

To achieve these ends the FCC is empowered to

Make such rules and regulations and
prescribe such restrictions and con-
ditions, not inconsistent with law,
as may become necessary to carry out
the provisions of this chapter. . . .
[47 U.S.C. 303(r).]

The courts have consistently recognized that in enacting Title III Congress intended to vest in the FCC pervasive regulatory authority extending to matters not specifically included in the Act itself. In National Broadcasting Company v. United States, 319 U.S. 190, 219 (1943), the Supreme Court stated:

In the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers. It was given a comprehensive mandate to "encourage the larger and more effective use of radio in the public interest" . . .

. . . While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding.^{29/}

The Act has since been held applicable not only to radio but to numerous new interstate communications services including television, subscription television (STV), cable television and its corresponding nonbroadcast

^{29/} See also Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940), wherein the Court observed that the Act "expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission".

subscription service, pay cable. The FCC's authority to regulate STV broadcasting was sustained in National Association of Theatre Owners v. F.C.C., supra, 420 F. 2d 194 (C.A.D.C., 1969), certiorari denied, 397 U.S. 922 (NATO). Therein the court stated:

The basic structure of Title III of the Communications Act . . . is a broad grant of general licensing authority to the Commission, subject to a number of specific exceptions and limitations. . . . This plan is consistent with the dynamic and rapidly-changing nature of the statute's subject matter, radio broadcasting, and the courts have consistently recognized that Congress intended to vest expansive powers in the Commission in order to avoid the necessity of repetitive legislation. [420 F. 2d at 199.] 30/

In United States v. Southwestern Cable Co., supra, 392 U.S. 157 (1968), the Supreme Court upheld FCC regulations governing the extent to which cable television systems could compete with local television stations by retransmitting over-the-air broadcasts from distant points. The Court held that the FCC has authority under the Communications Act to regulate CATV systems under the powers conferred upon the Commission by 47 U.S.C. 151 and 152(a). In so holding the Court relied upon the fact that the term "communication by wire or radio" is defined by 47 U.S.C. 153(a) and (b) to include "the transmission of . . . signals, pictures and sounds of all kinds" whether by radio or cable and "all instrumentalities, facilities, apparatus,

30/ The court here cited its decision in General Telephone Company of California v. F.C.C., 413 F. 2d 390, 390 (1969).

and services . . . incidental to such transmission" (392 U.S. at 167-168).

Having found that CATV systems came within the term "communication by wire or radio", the Court had no difficulty in finding that they were engaged in interstate communication even where, as in that particular case, the intercepted broadcast signals emanated from stations located within the same state in which the CATV systems operated. The Court stated:

We may take notice that television broadcasting consists in very large part of programming devised for, and distributed to, national audiences; respondents [cable television companies] thus are ordinarily employed in the simultaneous retransmission of communications that have very often originated in other States. The stream of communication is essentially uninterrupted and properly indivisible. To categorize respondents' activities as intrastate would disregard the character of the television industry, and serve merely to prevent the national regulation that "is not only appropriate but essential to the efficient use of radio facilities" (Citation omitted). [392 U.S. at 169.]

However, since the FCC in that case was asserting jurisdiction over cable television solely because of its impact upon conventional broadcasting, the Court stated:

There is no need here to determine in detail the limits of the Commission's authority to regulate CATV. It is enough to emphasize that the authority which we recognize today under § 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. [392 U.S. at 178.]

The authority of the FCC to enforce mandatory cable origination was subsequently sustained by the Supreme Court in United States v. Midwest Video, supra, 406 U.S. 31/ 649 (1972) wherein the Court stated:

. . . [T]he critical question in this case is whether the Commission has reasonably determined that its origination rule will "further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services." We find that it has. [406 U.S. at 667-668.]

The Court explicated:

To be sure, the cablecasts required may be transmitted without the use of the broadcast spectrum. But the regulation is not the less, for that reason, reasonably ancillary to the Commission's jurisdiction over broadcast services. The effect of the regulation, after all, is to assure that in the retransmission of broadcast signals viewers are provided suitably diversified programming--the same objective underlying regulations sustained in National Broadcasting Co. v. United States, supra, as well as the local-carriage rule reviewed in Southwestern and subsequently upheld. [406 U.S. at 669.]

In the present case, as in Midwest Video, Southwestern Cable, and National Broadcasting, the FCC's objective is to ensure that viewers are afforded suitably diversified entertainment. To accomplish this purpose, it has determined that it will allow pay cable to develop in a marketplace free of the economic inhibitions of state and locally

31/ P. 5 , supra.

imposed rate regulations. Plainly the Commission has requisite authority to do so under the Communications Act as construed in the above Supreme Court decisions.

In addition to these Supreme Court decisions, two courts of appeals' decisions are particularly apposite here. In National Association of Theatre Owners v. F.C.C., supra, 420 F. 2d 194, the District of Columbia Circuit determined that the FCC had authority to regulate subscription television rates, but expressed its approval of the Commission's decision to refrain from doing so until it had gained sufficient experience in the field. The court stated:

We approve the Commission's conclusion that it was not called upon to decide whether, or in what circumstances, its licensing regulatory functions might include surveillance or control over rates charged for services. [420 F. 2d at 203.]

As we have discussed above (p. 7) the FCC's policies with respect to pay cable television have directly paralleled its policies with respect to subscription television insofar as rate regulation is concerned.

In American Civil Liberties Union v. F.C.C., supra, 523 F. 2d 1344, the Ninth Circuit upheld the FCC's authority to regulate access channels, but struck down the ACLU's contention that the FCC had a duty to regulate rates charged for their use, noting that:

[T]he Commission fashioned its regulations to provide an incentive to the cable system operator to originate material attractive to subscribers and to avoid constraints on experimentation

and innovation. 36 FCC 2d 352, 1972
. . . [523 F. 2d at 1351.]

The appellants here rely upon two cases, National Association of Regulatory Utility Commissioners v. F.C.C., 533 F. 2d 601 (C.A.D.C., 1976) (NARUC II), and Home Box Office v. F.C.C., C.A.D.C. No. 75-1280, decided March 25, 1977, which they claim limit the scope of the FCC's jurisdiction over cablecasting as recognized in Southwestern Cable and Midwest Video. Actually, those cases support the FCC's position in this case. In National Association of Regulatory Utility Commissioners the District of Columbia Circuit held that an order of the FCC preempting state regulation of leased access channels when used for two-way, point-to-point nonvideo communications for such functions as burglar alarms, or the transmission of local messages exceeded the Commission's jurisdiction. In so doing, however, the court carefully distinguished Midwest Video, wherein the Supreme Court found that the FCC's origination requirement was aimed at providing "suitably diversified programming", stating:

We have great difficulty finding any such broadcast purpose which is served by the Commission's attempted preemption of state and local regulation of two-way cable operations. Unlike the origination requirement of Midwest, this preemption does not directly affect transmission in any medium which is of direct concern under the Commission's power over broadcasting. Whereas origination cablecasting will increase the mix of available viewing choices and thus serve an important general purpose of broadcast regulation, the private

nature of nonvideo, return communications involved here means that no general broadcast purpose is directly implicated. . . . [553 F. 2d at 615.]

Specifically, the Midwest order involved entertainment programs to be originated by the local cable company and transmitted over the same channels on which they transmit the programs of the regular television networks. The service that the FCC was regulating was ancillary to the service that it had been previously regulating because locally originated programs are indistinguishable from network programs when they arrive on the television receiving set in the home. In the instant case, however, the point-to-point communications via access cables, which involve one computer talking to another or to a citizen calling his city council, have no relationship whatever to entertainment programs by a national network which are now being sent by cable. [533 F. 2d at 616.]

The court below easily distinguished National Association of Regulatory Utility Commissioners from the present case, stating:

Although NARUC did limit the FCC's power, that limit was placed well beyond the FCC's present attempts to regulate pay cable TV.

The nexus between broadcasting purposes and "leased access channels for two-way, point-to-point non-video communications" which was found to be so patently missing in NARUC is obviously present in pay cable TV. [J.A. 161-162.]

In Home Box Office the court considered the validity of the FCC's so-called "anti-siphoning rules" which limited the programming that could be shown on pay cable in the interest of preserving program availability to conventional television stations. The court vacated certain

of these rules on the ground that they were unsupported by evidence in the record to show that a substantial danger of program siphoning did, in fact, exist. The court criticized the FCC for its "choice to regulate rather than allow a period of unregulated experimentation in which data could be generated that could form a predicate for informed agency action" (slip op., p. 53, n. 60). However, the entire decision is predicated on the assumption that the FCC possessed the authority to promulgate the regulations in question, and thus supports the Commission's view of its authority in the present case to preempt state regulation of pay cable rates.

In numerous other cases the District of Columbia Circuit and other Circuits have consistently held that the Communications Act allows the FCC broad discretion in promulgating rules and regulations pertaining to cable television. See e.g. General Telephone Co. of California v. F.C.C., supra, 413 F. 2d 390 (C.A.D.C., 1969); General Telephone of the Southwest v. United States, 449 F. 2d 846 (C.A. 5, 1971); Philadelphia Television Broadcasting Co. v. F.C.C., 359 F. 2d 282 (C.A.D.C., 1966).

II.

THE FEDERAL COMMUNICATIONS COMMISSION HAS PREEMPTED THE REGULATION OF PAY CABLE RATES.

Not only does the FCC have authority under the Communications Act to regulate pay cable television rates, as we demonstrated in Point I, but it has exercised its authority so as to preempt state and local regulation of per-channel or per-program charges not included in regular subscriber rates.

As we indicated in our statement of facts, by the mid-1960's the FCC was involved in regulating the growing pay cable television industry. In 1969, in an effort to encourage diversity of programming on cable TV, the Commission promulgated its program origination rules which were upheld by the Supreme Court in Midwest Video.^{32/} At this time, it announced that rules inconsistent with its program origination policies were preempted.^{33/} In 1972, following a public inquiry as to which aspects of cable television required national regulation and which could more appropriately be left to state and local regulation^{34/} the FCC formalized a policy of dual jurisdiction and promulgated regulations which permitted local authorities "to regulate rates for services regularly furnished to all subscribers",

^{32/} First Report and Order in Docket No. 18397, 20 FCC 2d 201.

^{33/} Id. at 223. See n. 7, at p. 5, supra.

^{34/} Notice of Proposed Rulemaking in Docket No. 18892, 25 FCC 2d 50 (1970).

but gave local authorities no control over pay cable rates.^{35/} At the same time the FCC expressly preempted local regulation of leased access channels--i.e. channels made available by the cable television systems, for a fee, to a third party who provides programming for home viewers.^{36/} This preemption included, of course, regulation of per-channel charges for such programming.

The FCC's implied preemption of pay cable rates, as opposed to regular subscriber services which were found appropriate for state and local regulation in its 1972 order, was expressly asserted in a clarification issued in 1974. There the Commission stated:

We have intentionally and specifically limited rate regulation responsibilities to the area of regular subscriber service and we will continue to do so. We have defined "regular subscriber service" as that service regularly provided to all subscribers. This would include all broadcast signal carriage and all our required access channels including origination programming. It does not include specialized programming for which a per-program or per-channel charge is made.^{37/}

The FCC simultaneously stated the rationale behind its preemption of leased access channels, stating:

^{35/} Cable Television Report and Order in Docket No. 18397, ³⁶ FCC 2d 143 (1972).

^{36/} Id. at 193.

^{37/} Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry in Docket No. 20018, 46 FCC 2d 175, 199.

It remains our intent to keep [leased access] channels as free as possible from any regulation that might restrict or artificially alter their growth. This is particularly true in the area of rate regulation. We have preempted this area with the explicit purpose of allowing the marketplace to function freely. 38/

And with respect to both leased access channels and pay cable the Commission observed:

We note that many authorities are already talking about regulating leased channel rates and/or rates for pay cable services. It is premature to regulate along these lines. Such regulation might destroy any chance for this emerging communications service by stifling competition, setting incorrect rates, and establishing an atmosphere which deters experimentation, innovation, or speculation. We have pre-empted this area to avoid those pit falls. It is unclear how a regulatory body could now establish reasonable rates for services that are untested, unproven, and which have not even established a consistent record as to costs, expenses, subscription, etc. 39/

In 1975, the FCC reasserted its preemption of subscription television and pay cable rate regulation stating:

[W]e note that a number of cable television franchises contain provisions purporting to regulate subscription cable television or to ban the service entirely. We have specifically stated that "... the Commission has pre-empted the field of pay television cablecasting so that local franchise terms [purporting to regulate subscription cablecasting] are inoperative." [Citation omitted.] In paragraph 130 of the Cable Television Report and

38/ Id. at 185.

39/ Id. at 185-186.

Order the Commission stated:

. . . it is the Commission that must make the decisions as to conditions to be imposed on the operation of pay cable channels; and we have already taken steps in that direction . . . Federal regulation is thus clearly called for.

Although we have not ourselves undertaken the regulation of rates for the sale of subscription programming, we regard our prior statements concerning the regulation of subscription operations as preempting local regulation of rates as well as program content.^{40/}

The FCC then further explained its "non-regulatory" policy for pay television and pay cable:

We do not believe that regulation of subscription rates is either practicable or necessary at this time. The competitive alternatives to subscription television are plentiful, including most particularly free television, motion picture theatres, live sports, and other entertainment events. As we said with respect to over the air subscription rates:

The public is free to subscribe or not to subscribe to STV services. We believe that the marketplace will regulate the charges that are paid and that, if they are excessive, the operations will not succeed . . .

In any case, we believe that the complex nature of subscription cablecasting and broadcasting, with implications not coincident with state boundaries, dictates that its regulation emanate from a single source, and that determinations as to when and how to regulate the service must be made at the federal level.^{41/}

^{40/} First Report and Order in Docket No. 19554, 52 FCC 2d 1, 67.

^{41/} Id. at 67-68.

In the light of the foregoing policy statements there can be no doubt that the FCC has exercised the jurisdiction "ancillary to broadcasting" conferred on it by the Communications Act so as to preclude state and local rate regulation of pay cable television, even though the Commission has not itself undertaken to prescribe rates. This case is analogous to Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767 (1947), wherein the State of New York claimed it had the right to regulate in the area of labor relations, a field within the jurisdiction of the National Labor Relations Board under the National Labor Relations Act, until the Board had affirmatively undertaken regulation. The state courts ruled in favor of the State but the Supreme Court reversed stating:

[T]he power of the state may not so deal with matters left to its control as to stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. . . .'

[W]hen federal administration has made comprehensive regulations effectively governing the subject matter of the statute, the Court has said that a state regulation in the field of the statute is invalid even though that particular phase of the subject has not been taken up by the federal agency. . . . However, when federal administrative regulation has been slight under a statute which potentially allows minute and multitudinous regulation of its subject . . . the case will be treated as one in which the effectiveness of federal supervision awaits federal administrative regulation. . . .

. . . . However the conclusion must be otherwise where failure of the Federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute.
[330 U.S. at 773-774; emphasis added.]

In the instant case the FCC, which has jurisdiction over cable television under the Communications Act, has affirmatively ruled that no regulation of pay cable rates is appropriate, and that the states and local authorities are precluded from such regulation. The Commission has made a reasonable determination that state regulation of pay cable rates would stand "as an obstacle to the accomplishment and execution of the objectives of the Congress" as expressed in the Communications Act. Therefore, the regulation of pay cable rates which has been attempted here by the State of New York is invalid.^{42/}

There are two preemption cases directly in the broadcast field--Head v. Board of Examiners, 374 U.S. 424 (1963) and TV Pix, Inc. v. Taylor, 304 F. Supp. 459 (D. Nev., 1968), affirmed, 396 U.S. 556 (1970)--on which the appellants rely. In Head the Supreme Court held that the FCC had not preempted the field of radio advertising so as to preempt state regulation of medical advertising, and in TV Pix a three-judge district court held that the FCC had not preempted the regulation of community television

^{42/} The Supreme Court has since applied the Bethlehem Steel test in Florida Lime Growers v. Paul, 373 U.S. 132 (1963); Perez v. Campbell, 402 U.S. 637 (1971); and Goldstein v. California, 412 U.S. 546 (1972).

antenna systems although it had the power to do so.^{43/}
The FCC had not promulgated applicable regulations in
either case, and made no claim of preemption. In Head the
Court stated:

[T]here has been no showing of any conflict between this state law and the federal regulating system, or that the state law stands as an obstacle to the full effectiveness of the federal statute. No specific federal regulations even remotely in conflict with the New Mexico law have been called to our attention. The Commission itself has apparently viewed state regulation of advertising as complementing its regulatory function, rather than in any way conflicting with it. [374 U.S. at 432.]

On the other hand, the Supreme Court held that the Communications Act displaced state laws of defamation insofar as those laws directly conflicted with the "equal time" aims of 47 U.S.C. 315 in Farmers Educational Cooperative Union v. WDAY, Inc., 360 U.S. 525 (1959).

In a concurring opinion in Head Mr. Justice Brennan set out the three fold test "by which we determine whether federal legislation has displaced state regulation of a given subject matter"--(1) whether the subject matter is

^{43/} In TV Pix the court observed:

[W]hether the preemption has in fact occurred, invalidating the Nevada Community Antenna System Law under the Supremacy Clause of the Constitution depends on whether the Federal Communications Commission has, in fact, regulated in this area and not upon whether it has the power to do so. [304 F. Supp. at 465.]

one "by its very nature admitting only of national supervision"; (2) "whether there is evidence of congressional intent exclusively to occupy the field"; and (3) whether as a practical matter "both regulations can be enforced without impairing the federal superintendence of the field" (374 U.S. at 442-445). Mr. Justice Brennan's third test is applicable here because it is obvious that, as a practical matter, state regulation of pay cable television rates cannot be permitted without impairing the FCC's superintendence of the field. Any regulation of pay cable by the State of New York will necessarily conflict head on with the Commission's decision to permit pay cable television systems a period of growth and development free from federal or local regulation. Moreover, if in the future the FCC should decide to regulate pay cable rates, there would still be a conflict and a preemption. In the words of Chief Justice Burger in General Telephone Co. of California v. F.C.C., supra, 413 F. 2d at 401:

[A]ny other determination would tend to fragment the regulation of a communications activity which cannot be regulated on any realistic basis except by a central authority: fifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a uniform system of communication. The Supreme Court aptly characterized the functional aspects of CATV systems as an "essentially uninterrupted and properly indivisible" stream of communication.

III.

THERE IS NO MERIT TO THE VARIOUS CONTENTIONS OF THE STATE COMMISSIONERS AND NARUC ON THIS APPEAL.

A. The New York State Commissioners contend that the FCC has neither the statutory nor constitutional authority to preempt state regulation of pay cable rates, that the purported preemption does not exist, and that their "Clarification" of the New York law in question (McKinney's Article 28, §§ 822, 825) does not conflict with any federal statute, regulation or order. We believe that we have already demonstrated the fallacy of these arguments. However, we will respond briefly to the Commissioners' major contentions seriatim.

In Point I of their Argument (p. 12) the State Commissioners assert that preemption of state law is not to be inferred from the mere fact that Congress has acted in a given area--a proposition with which we do not quarrel. More specifically, they rely on Head v. New Mexico Board of Examiners, supra, 374 U.S. 424 and TV Pix, Inc. v. Taylor, supra, 304 F. Supp. 459, which we have discussed above, for the proposition that no preemption of state laws has resulted from Congress's enactment of the Communications Act. However, as we have pointed out above, in both cases the courts indicated that had the FCC exercised its authority under the Communications Act in such a way as to create a conflict between federal policy and state regulation, preemption would have occurred. That is what has happened in the instant case. Contrary to the

State Commissioners' stance, the FCC does not contend here that it has absolutely preempted the entire field of pay cable television, but only that it has preempted the right to regulate, or alternatively to opt for a policy of non-regulation, of pay cable rates. Nothing more is involved.

The State Commissioners point out that under the Supreme Court's decisions the FCC's authority to regulate cable television is "restricted to that reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting" (Brief, p. 14), and claim that the FCC's authority cannot extend to the regulation of pay cable rates paid by citizens of the state because this is a purely local matter (p. 16). This argument ignores the multi-state and indivisible nature of cable television which has already led the Supreme Court to hold in Southwestern Cable and again in Midwest Video that cable television is interstate communication (392 U.S. at 167-169; 406 U.S. 659-660). See also General Telephone Co. of California v. F.C.C., supra, 413 F. 2d 390, 400-401 (1969).

The State Commissioners cite a staff report by the Subcommittee on Communications of the House Committee on Interstate and Foreign Commerce (94th Congress, 2d Session), which they imply supports their view of the FCC's limited jurisdiction because the staff recommended that "the federal regulatory role should be confined to those aspects requiring national delineation of standards" (Brief, p. 16). However, the Commissioners have failed to advise this

Court that in that same report the staff stated:

[W]e believe that the Commission has appropriately ruled out state/local regulation in several areas such as the carriage of broadcast signals or the presentation of non-broadcast television programming like pay cable and public access. . . . [B]ecause the viewer may not distinguish between broadcast television programming and cable television programming, the Commission properly takes plenary jurisdiction here opting for a period of maximum experimentation for cable television presentations, free from state/local regulations. [Report at p. 82.]

As we noted above, the State Commissioners also rely upon the District of Columbia Circuit's decision in National Association of Regulatory Utility Commissioners v. F.C.C., supra, 533 F. 2d 601 (1976), a case which is readily distinguishable from the present case. That case involved such non-video communications over leased access channels as would ordinarily be carried over a telephone communications system rather than the transmission of entertainment programs. The decision does nothing to diminish the FCC's authority over cable television insofar as the transmission to viewers of such programs as are normally associated with television broadcasting is concerned. As Judge Lumbard's concurring opinion indicates (533 F. 2d at 622), the majority of the panel in that case simply could not find the requisite nexus between these two-way non-video communications and traditional concepts of television broadcasting to satisfy the "ancillary to broadcasting" criterion. Judge Lumbard was persuaded, however, that

"cable television activities that are ancillary to television broadcasting, which is undoubtedly interstate in character, become by that fact alone, subject to FCC jurisdiction despite the possibility that all acts performed by the cable operators occur within the confines of a single state" (533 F. 2d at 601). Thus Judge Lumbard would reject the State Commissioners' contention here that intra-state cable transmissions are not subject to FCC regulation. Moreover, we note in passing that Judge Wilkey's "common carrier" test, which is cited by the State Commissioners (Brief, p. 20), was not concurred in by Judge Lumbard or dissenting Judge Wright.

The State Commissioners suggest that a Tenth Amendment problem is involved here in that the FCC has abrogated the power of the State of New York to review the rates charged its citizens without being given any express power in the Communications Act to do so (Brief, p. 21). This is a futile argument in view of the fact that the Supreme Court has determined that the FCC exercises over CATV the broad authority that is conferred by the Communications Act for "communications by wire or radio" when the regulated services are "ancillary to broadcasting". No express authority is needed in view of the Supreme Court's construction of the Act in Southwestern Cable. See also Mt. Mansfield Television, Inc. v. F.C.C., 442 F. 2d 470, 480 (C.A. 2, 1971); Home Box Office, Inc. v. F.C.C., supra, slip op., p. 48.

Finally, the State Commissioners argue that the FCC has never "promulgated a regulation" which would preclude the states from acting to regulate pay cable rates (Brief, p. 22). However, they cite no authority for the proposition that a regulation is necessary for federal preemption of a conflicting local regulation. Bethlehem Steel Co. v. New York State Labor Relations Board, supra, 330 U.S. 767, is decisive here. We also invite the Court's attention to Judge Wright's dissent in National Association of Regulatory Utility Commissioners, supra, 533 F. 2d at 635, n. 23:

Since the issue before us is the Commission's power to preempt nonfederal rate regulation, it is irrelevant that the Commission has chosen not to regulate rates itself. Given the Commission's concern that local regulation might be designed to protect existing providers of communications services or might otherwise harm the development of cable, allowing local regulation if the Commission does not regulate might force the Commission to regulate preemptively. It would be ludicrous to compel the Commission to follow a policy it rejects in order to preserve its power.

The State Commissioners appear in fact to be contending here that the FCC must affirmatively regulate to prevent state and local authorities from regulating pay cable rates--a position which we submit is untenable.

Contrary to the State Commissioners' assertion (p. 28), there is a direct conflict between the FCC's policy of non-regulation and the authority claimed by the New York State Commission to regulate pay cable rates through

the approval of local franchises in which such rates must be specified. The court below properly enjoined the State of New York from regulating or attempting to regulate pay cable rates (J.A. 7) because compliance by cable systems with both the FCC policy and the New York State law, as "clarified" by the Commission, is impossible.^{44/}

B. The National Association of Regulatory Utility Commissioners, in addition to contending that the FCC has no jurisdiction to preempt state regulation of pay cable rates, and that the FCC has not effected a preemption by its issuance of policy statements, also contends that the FCC "has not demonstrated an adequate need" for preemption and "has not met the high standards necessary to preempt state control over local facilities" (Brief, pp. 7-8). We believe that we have already dealt adequately with the matters of the FCC's jurisdiction to regulate pay cable television so as to preempt state regulation, and the steps it has taken to effect a valid preemption. We will direct our attention here only to NARUC's latter two arguments. Before doing so, however, we wish to point out

^{44/} The State Commission's final argument that the 1976 proceedings in which the FCC considered revision of its rules with respect to its franchise standards casts doubt upon the preemption claimed here is specious. In its report concluding those proceedings the FCC stated:

Local and state authorities are preempted, of course, from regulating rates, terms and conditions of pay and other video auxiliary services . . . Report and Order in Docket No. 21002, September 30, 1977, slip op. p. 29, n. 21.

that we do not believe that the questions raised by NARUC with respect to the adequacy of the procedures by which the FCC has preempted state regulation of cable television are properly before this Court. This case is not an action to review FCC rules and regulations, as were National Association of Regulatory Utility Commissioners (NARUC II) and Home Box Office, upon which NARUC relies. As in Southwestern Cable, "the issues in this case are only two: whether the Commission has authority to regulate CATV systems, and, if it has, whether it has in addition the authority to issue the prohibiting order here in question" (392 U.S. at 157). In that case the Court emphasized that "questions as to the validity of the specific rules promulgated by the Commission for the regulation of CATV are not now before the Court".

Here the district court did not inquire into the sufficiency of the evidence supporting the FCC's preemption and we do not believe that this Court should do so. However, we assure the Court that the FCC's decision to prohibit the regulation of pay cable and to let pay cable rates be set by the free marketplace is based upon its prior experience in regulating other communications media and not on mere "conjecture and supposition" (Brief, p. 22) as NARUC would have it.

Free competition in the open market is a principle the FCC often applies to the regulation of the communications media,^{45/} and one it has applied in particular to the

^{45/} See e.g. Federal Communications Commission v. Sander Bros. Radio Station, 309 U.S. 470 (1940).

regulation of subscription television programming.^{46/} The FCC preempted the regulation of pay cable rates for two basic reasons: first because a free market assures optimum opportunities for pay cable to develop in terms of the number of subscribers it can reach and the innovative programs it can offer; and second, a free market will result in reasonable charges to viewers. The funds put into pay cable are derived from two sources--risk or venture capital provided by investors, and subscribers' fees. Depending on the monies received from those sources, pay cable entrepreneurs are enabled to use new modes of transmission (domestic satellite, microwave, etc.) to enable more systems to operate and to develop diverse programming. Since pay cable is a relatively new enterprise, the financial risks are high and investment incentive must be afforded to attract needed funds. The development of pay cable is in the public interest because pay cable, unlike conventional television, is not dependent upon advertiser support and thus need not cater to the programming tastes of a vast general audience. Instead it is free to develop any programs that will appeal to its subscribers and be financially supported by them. The FCC has consistently maintained that the development of a viable pay cable network will therefore advance the goals of the Communications Act "to make available, so far as possible, to all

^{46/} Fourth Report and Order in Docket No. 11279, 15 FCC 2d 466 (1968); National Association of Theatre Owners v. F.C.C., supra, 420 F. 2d 194 (C.A.D.C., 1969).

people of the United States a . . . communication service with adequate facilities at reasonable charges" (47 U.S.C. 151). Its preemption of state regulation of cable television, except for such local interest aspects as are expressly delegated by regulation to state and local authority, is designed to make maximum development of the industry possible.

The FCC's reason for believing that state or local regulation of pay cable rates can inhibit growth and innovation in pay cable services was fully explained to the district court. Mr. James R. Hobson, Chief of the Cable Division Bureau of the FCC testified as to the FCC's experience in regulating subscription television, which is the character of pay cable. He indicated that strong opposition by theatre owners and others opposed to subscription television resulted in campaigns against it directed to state legislatures. In particular, he noted that the "Free Television Act" which was enacted in California destroyed one early pay television experiment. Although the California Supreme Court ultimately held the Act unconstitutional, the cable system by this time had lost \$10 million and gone into bankruptcy (J.A. 106-107).

Mr. Hobson gave other examples of legislation proposed but not enacted by states or municipalities, including New York State, which were aimed at restricting pay cable programming in the interest of protecting theatre owners (J.A. 107-108). He reasoned that in the absence of the Commission's

preemption, some of these measures might well have been enacted.

If this Court wishes to inquire further into the reasonableness of the FCC's preemption, we suggest that it take judicial notice of the testimony of Mr. Gustave M. Hauser, Chairman of Warner Cable Corporation, before the Senate Subcommittee on Communications of the Committee on Commerce, Science and Transportation, 95 Cong., 1st Sess., 1977. Warner Cable is currently providing its subscribers in Columbus, Ohio, with a wide-ranging package of cable programming that includes current and classic films, music programs, and special interest programs which can be paid for on a subscriber or per-program basis. The Columbus system is considered to be the bellwether of pay cable's future and is being closely watched by the communications industry.^{47/} Mr. Hauser stated with respect to the New York State Commissions' "Clarification" of Article 28:

Another state cable television commission has ruled that despite the preemption of pay-T.V. by the F.C.C., it will, nevertheless, regulate rates and other aspects of any pay-T.V. undertaking. This state regulation has meant that anyone seeking to provide services other than basic cable must first request permission from each local community served and then from the state with respect to each such service. The initial charge for each such service and any change thereafter is also subject to multiple approvals

^{47/} See Broadcasting, 93:21 (November 21, 1977) 42-43.

involving public hearings and inordinate delays. Were Warner to pursue a Columbus-type project in this state, we would be required to seek prior approval of the price charged for each individual motion picture, electrogame, college course, children's show, cultural or sporting event, etc. The need for such regulation is difficult to comprehend, since these are highly competitive, and in no way utility services. Moreover, it is almost impossibly burdensome to seek approval of literally thousands of prices, from time to time. Local governments are not required to deal with this; costs vary from day to day; pricing must be instantly adjustable to reflect the market. Regulatory delay might be months to a year for any given price, by which time the event would be long obsolete and have no further value. Although this had been repeatedly explained to the state commission, it has persisted in pursuing this course of conduct. This is an abusive, self-defeating regulatory atmosphere in which neither our business or any other can possibly survive. The state commission has, in effect, rendered any future [pay] cable services in that State impossible.

Affidavits filed by the plaintiffs below also indicate that the FCC's preemption was predicated upon a rational assumption that state and local regulation would be harmful to the development of an economically viable pay cable industry. Bruce P. Sawyer, Executive Vice President of Home Box Office ("HBO"), stated:

The New York Commission's price control rule and the uncertainty created by the clash between the federal and state policies have stopped the growth of pay cable in New York. Since the New York Commission announced its policy on March 1, 1976, HBO has found that it is virtually impossible to obtain new affiliates in New York State. Cable television

system operators are understandably reluctant to go forward with pay cable in the present regulatory climate of controlled prices and uncertainty. Despite HBO's continuing effort, HBO has met with little success in its attempt to recruit new affiliates in New York. [J.A. 76.]

Stuart Feldstein, Vice President of National Cable Television Association, asserted:

There are approximately 165 cable television systems in New York State with approximately 800,000 subscribers. Today, only about 45 of those systems are offering the new pay programming service. Many NCTA members in New York wish to introduce this new program service. . . . But under the State Commission's Policy, a cable television system not offering pay program service prior to March 1, 1976 cannot now do so, unless it obtains approval of its prices from its local franchising authority and the State Commission. This is a lengthy and uncertain process. . . . Because of the State Commission's rule and the uncertainties created by the conflict between the state agency and the FCC, many cable systems in New York have postponed or abandoned plans to introduce pay programs. . . . New York, the only state attempting to regulate pay program prices, has discouraged new entry into this field in the State, while pay services expand in other sections of the United States. [J.A. 88.]

The second predicate for the FCC's preemption--that the free market will adequately regulate pay cable rates -- derives from the Commission's experience of nearly two decades of regulating subscription television (STV) rates.^{48/} The FCC's determination to leave STV rates to the determination of the free market was sustained by the District

^{48/} See Fourth Report, *supra*, 15 FCC 2d at 547-548.

of Columbia Circuit in National Association of Theatre Owners, supra, 420 F. 2d at 198, with the observation:

. . . [T]he Commission rejected the suggestion, urged by petitioners and others, that direct regulation of the rates charged by STV stations was necessary in order to prevent "gouging" of the public; instead, it concluded that the available evidence rendered this possibility remote, and that free market forces would be a sufficient check on the prices charged for STV services. We hold that the Commission acted reasonably and within the scope of its authority, both in making the initial decision to authorize permanent nationwide STV and in imposing specific regulations governing subscription television.

In Southwestern Cable, supra, 392 U.S. at 177, the Court indicated that courts should not "in the absence of compelling evidence that such was Congress' intention . . . prohibit administrative action imperative for the achievement of an agency's ultimate purposes". There is nothing in the Communications Act or its legislative history as considered by the Court in Southwestern Cable (392 U.S. at 167-173) and Midwest Video (406 U.S. at 649-670) to indicate that Congress did not intend the FCC to exercise federal preemptive authority over state and local regulation when necessary to foster the development of new communications systems. On the contrary, since the purpose of the Communications Act is to establish national communications media, such preemption was certainly contemplated by the Congress. Accordingly, there is no merit to NARUC's contentions that the FCC must meet some undefined "strict standards" or "rigid guidelines" (Brief, pp. 28-29) before

it can preempt state regulation of pay cable, which is by its nature an interstate communications media. The FCC's determinations should be sustained unless they are found to be "arbitrary or against the public interest as a matter of law". Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F. 2d 407, 482 (1971); Radio Corporation v. United States, 341 U.S. 412, 420 (1951). Under this test the determinations in question are plainly valid.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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I hereby certify that on this 16th day of December, 1977, I served the foregoing Brief for the Intervenor United States and Federal Communications Commission upon counsel for all parties by causing copies to be mailed, postage prepaid, to:

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